

Local Government Handbook: Legal Requirements – The Municipal Attorney

(revised 4/18/03)

Introduction:

Municipalities operate in a world of laws. They are created by state laws, must function according to state laws, and enact and enforce local laws. Legal problems can be avoided if local officials work effectively with qualified attorneys who are hired as needed for specific legal projects or as in-house counsel. This section will assist you in identifying legal problems needing an attorney, deciding whether and how to hire an attorney, and how to work effectively with an attorney.

Many local governments establish a relationship with an attorney to provide advice and other legal services. Frequently attorneys specialize in different areas of practice, one of which might be municipal law. This doesn't mean that an attorney that hasn't specialized in municipal law can't be qualified to provide effective service. The attorney, often called the "municipal" attorney, is an important resource. The most important thing a municipal attorney does is to act as the "legal advisor" to help prevent problems before they happen.

Most small rural municipalities in the state do not need or have enough money to afford to hire a full-time municipal attorney. Municipal attorneys are often private practice attorneys who have a lot of experience working with municipal law. Municipalities often have a formal or informal agreement with the attorney setting out the method of payment (flat fee or hourly rate), the fee or rate to be charged for services, and an estimate of how long it will take to provide the legal service. Usually, the attorney keeps track of how much time is spent working on the legal issue(s) and sends a bill to the municipality when services have been performed.

Identifying a Legal Problem

Occasionally, the various actions or projects that a local government does require special legal steps or review. Projects, and their possible legal problems, differ greatly. Following are some examples of problems that might require legal attention:

- ✳ A business or individual breaks a contract and does not perform as required under the agreement.
- ✳ A municipality prepares an ordinance that needs legal review.
- ✳ The governing body has concerns about entering into an agreement with an individual because of a possible conflict of interest.
- ✳ The municipality is unsure how to prepare a complicated legal agreement.
- ✳ An individual or business threatens to bring a court action in state or federal court.
- ✳ There are problems with land ownership.
- ✳ The municipality is unable to collect money owed to it.

- ✴ The governing body is unable to reach an agreement or settlement with another party in an important business matter.

If the organization faces one or more of these or similar questions, do the following:

- ✴ **Get the facts:** Talk to those who are familiar with the problem. Assemble all records, files, and statements on the question.
- ✴ **Review the facts:** Determine what additional information, if any, is needed to present the facts to the governing body.
- ✴ **Prepare a report:** Include in the report what happened, who was involved, when it happened, where it happened, the results of the incident, and any letters, contracts, or other materials necessary to understand the problem. Convey all the facts as accurately and objectively as possible.
- ✴ **Present the report to the governing body:** Record discussion of the report in the meeting minutes. The mayor or a member of the governing body may present the report as new business during a regular meeting, as a single topic to consider at a special meeting, or in executive session if it is a matter that can be discussed in a meeting which is closed to the public. (See the *Local Government Handbook, Organization of City Government – City Council Meetings* for more information on the Open Meetings Act.) The governing body decides whether legal action should be taken. (Decisions cannot be made in executive sessions.)

Advisory Services: The Department of Community and Economic Development's Division of Community and Business Development (DCBD) provides informal advice on basic legal questions such as the conduct of elections, recall of officers, boundary changes, and administrative matters. The Alaska Municipal League may also be able to provide assistance.

When should a municipality consult an attorney?

It is a good idea to use the services of the municipal attorney at the beginning of a situation or as an issue is developing, rather than after action is taken that becomes a problem. In other words a municipality will save more money if it uses an attorney as a legal advisor rather than as a defender of a municipal action in court.

Following are some typical situations that would benefit from use of an attorney:

Preparing a contract or providing representation in a lawsuit.

To hire an attorney for a specific project:

- ✴ Discuss the legal problem with the governing body. Make certain that you have full approval to hire an attorney for the particular issue.
- ✴ To identify attorneys who have a proven background in the particular area of law in which you need assistance, call or write to other communities of similar size to get attorney recommendations. You may also contact the Alaska Municipal Attorneys'

Association through the Alaska Municipal League, if you are a member; or you may call the Lawyers' Referral Service in Anchorage, which refers clients to attorneys who are members of this referral service. Briefly explain the problem and ask if they can recommend an attorney with a strong background dealing with the issue in question.

- ✳ Call or meet with the attorneys that you are interested in working with. Begin by explaining the legal issue or project clearly. Include all important facts and points including those that are not in your favor. In response, the attorney should outline the scope of the proposed legal project, give his opinion on whether the project should be undertaken, and, in legal disputes, state what he considers to be the chances of success. Finally, the attorney should provide an estimate of the cost of services for the project. Most attorneys do not charge, or charge only a minimal amount, for this initial meeting.
- ✳ Determine the organization's ability to pay. If a decision is made to move forward with the legal project and is satisfied with the attorney, work out an agreement for services, including a means of payment. Most attorneys are paid on an hourly basis or a flat fee for each project.
- ✳ Submit a resolution for retaining counsel to the council. Adoption of the resolution by the council authorizes the attorney to represent the city as its attorney in that matter.

Contracting with a Municipal Attorney to Handle Several Projects

Because legal problems may arise quickly and require immediate attention by a qualified attorney, many municipalities retain a part-time municipal attorney to provide on-going legal advice on an as-needed basis. Two advantages of contracting with an attorney to provide "as-needed" legal advice and representation are:

- ✳ It is quicker to work with an attorney already familiar with the organization than to go through a selection process each time a legal project arises.
- ✳ It usually costs less in total legal fees if the attorney is familiar with ongoing issues than to pay various attorneys hired for individual projects.

The following steps are recommended to retain an "as-needed" attorney to provide legal assistance:

Step 1: Estimate how many hours attorney assistance might be needed.

Step 2: Prepare a written request for proposals (RFP) which is a written invitation to qualified attorneys to submit a statement of their professional qualifications to help ensure the selection of the most qualified. At a minimum, the request for proposals should ask attorneys to provide:

- ✳ A description of the attorney's legal education and professional experience, with particular emphasis on prior experience in municipal law.
- ✳ Local client and non-client references that can be contacted in writing or by telephone regarding the proposed attorney's qualifications and abilities.
- ✳ Evidence that the attorney is a member of the Alaska Bar Association and is fully qualified to practice law in all courts of the State of Alaska.

- ✳ A writing sample from that attorney demonstrating that attorney's ability to communicate clearly and effectively in writing.
- ✳ A fee schedule or proposal that explains the attorney's hourly rate and billing practices and procedures.

Once the request for proposals is completed, mail it to local attorneys and legal firms who have expressed an interest and attorneys recommended by other communities or other referral sources. Advertisements in local newspapers and in Anchorage, Fairbanks, and Juneau newspapers will also provide additional notice to prospective applicants.

Step 3: Once proposals from interested attorneys have been received, the governing body and/or the mayor or manager should meet to review the proposals and select a short list of attorneys to be interviewed. Attention should be paid to professional experience of particular relevance to the concerns of the organization.

Step 4: Candidates should be invited, at their own expense, to meet with the governing body.

Step 5. Once an attorney is selected, designate a representative such as the mayor, manager, or administrator to negotiate a contract with the attorney. The contract should plainly set forth the rights and duties of the attorney, the method and time of payment, and the scope of work to be performed by that attorney.

A sample contract is included in the appendix of this manual. The sample contract can be tailored to meet individual needs of your organization.

Step 6. Once the contract has been negotiated, present it to the governing body for final approval.

Working Effectively with your Attorney

The quality of the legal advice provided will increase as the quality of the relationship with the attorney improves and evolves. Following are some suggestions for improving or maintaining a good relationship with your attorney:

- ✳ Clearly define the legal problem or problems to be addressed by the municipal attorney. Describe in as much detail as possible the specific problems to be addressed.
- ✳ If a legal problem requires the attorney to review your organization's documents, take the time to assemble, correct, and complete copies of all pertinent documents from your files. This will be far cheaper than leaving it to the attorney to identify and locate those documents.
- ✳ Distinguish between legal and policy matters before referring an issue to an attorney. Administrators and elected officials are more capable of resolving policy questions than are lawyers. Lawyers, on the other hand, are usually more able to handle legal matters than those who have not had any legal training.
- ✳ Ask the attorney to submit itemized monthly billings broken down into tenths of an hour describing work actually performed. It is important to monitor these reports to

ensure that costs of legal services are not higher than expected and funds are available for those services.

- ★ Before authorizing any work by the attorney, get an itemized estimate of the amount of time and expenses from the attorney for the particular project. That estimate, while certainly not binding on either party, will help the attorney in planning his time and effort in the project and will aid in monitoring the attorney's progress.
- ★ Keep the attorney informed. He is retained as a professional legal advisor, so do not fail to disclose any important information, even unfavorable information that the attorney might need to provide effective representation.

Legal Opinions: Sometimes it is a good idea to seek advice and an opinion from the attorney before doing an action. The chief administrator might ask an attorney to give an opinion discussing the legal issues associated with different alternatives. Whether the opinion should be in writing or simply conveyed in conversation will depend on the issue and the circumstances. Some situations may require a carefully researched written opinion. Following are some examples:

- ◆ whenever there is a possibility that lawsuits will be filed by those who might lose a lot of money, as a result of a decision.
- ◆ whenever an action will establish procedures that will guide the municipality for many years,
- ◆ whenever an action must conform to a process established by state or federal law,
- ◆ whenever an action will infringe on the protected rights of residents or will likely make a sizeable number of them unhappy.
- ◆ whenever an action will create or end a legal relationship that could commit the organization far into the future.
- ◆ whenever the municipality is considering a potentially large lawsuit or has been sued and the consequences of losing could have a large financial impact

Sometimes an attorney will be able to advise right away whether an action is legal or illegal. More often the attorney will point out potential legal problems that may accompany the various options being reviewed. These potential legal problems are just some of the things that need to be considered when making a decision.

It is important to understand the difference between being “sued” and “being liable”. Good cause is not needed to file a lawsuit, but good cause is needed to win one. The possibility of being sued must be considered, but it shouldn't be the entire basis of the decision. The purpose of a legal opinion is not to help make decisions that avoid lawsuits, the purpose of a legal opinion is to help make decisions that will be upheld if they are challenged in court.

In order to give an opinion the attorney must have all of the facts and details affecting a situation or proposed action. This includes facts and circumstances that may not favor the organization. An attorney cannot make a recommendation or present all of the options unless the client is being honest. The law recognizes the need for honesty between attorney and client and protects this information shared between attorney and

client. This is known as attorney-client privilege. This privilege covers confidential communications between the attorney, staff, and other officials of the organization. It means that letters or verbal advice that is intended to be confidential is not public and generally cannot be read or used against the municipality by somebody who may be suing the municipality.

The “attorney-client privilege” is very important to remember and is one very good reason to consult with an attorney very early in the process when there is a possible legal issue involved. In order to help ensure the correct legal response, or defend the organization against a lawsuit the attorney can give directions to local officials, conduct research and investigations or prepare confidential reports. All of these acts if performed by the attorney or by employees or officials acting under the direction of the attorney may be protected in a legal proceeding by the attorney-client privilege. The same acts done by employees without the direction of the city attorney are not protected. Even remarks or reports made in an authorized executive session of the governing body are not protected from disclosure in a legal proceeding. For example, a report prepared by the city manager advising the city council of a legal problem and outlining alternatives for the council may be presented to the council in executive session. The fact the report was presented in executive session will not protect it from being made available to the other side in a legal proceeding. However, if that same report is prepared by the attorney or under the guidance or direction of the attorney it may be protected from disclosure by the attorney-client privilege.

The attorney and the client should keep files on any legal opinion letters. Legal opinions having to do with sensitive matters should be kept in a confidential file available only to the appropriate officials.

Preparing Ordinances: An attorney’s advice can be helpful whenever a municipality is considering an ordinance that is intended to control the behavior of citizens and will impose fines, jail time, or both for violations of the ordinance, or any other ordinances that affect a person’s rights. In Alaska municipal ordinances are enforced through the state courts and these courts will not enforce a municipal ordinance that is poorly written, not clear, or violates the rights of citizens under the Alaska or the United States Constitution.

It is not always necessary to have an attorney prepare the ordinance. Many sample ordinances are available that municipal officials can adapt and use to prepare a working draft, which can save the municipality the money it would otherwise pay an attorney. If an ordinance requires attorney review, any substantive amendments to the ordinance that are suggested after the public hearing should also be reviewed.

Preparing Contracts: How much an attorney needs to be involved in preparing a contract depends on the circumstances. Most of the contracts that a local government enters into are routine, like purchase orders, rental agreements, service contracts, land use permits etc. These are usually a standardized form that does not need attorney review of each transaction. It is a good idea to have an attorney occasionally review the

standardized forms to make sure there have not been court decisions or changes to state or federal law that may affect these forms. This includes many of the forms available in the Local Government Handbook.

More complex agreements or situations involving large amounts of money and long-term commitment should have attorney assistance. This does not necessarily mean an attorney will actually need to draft these contracts. Even the more complex agreements contain certain standard language and concepts or “boilerplate.” Just because many of these terms are “standard” does not mean the terms are “non-negotiable.” An attorney is useful to review the negotiations and the “fine print” to assure there are no surprises or unusual language that might cause problems. In some cases an attorney may review contracts prepared by other municipal officials, for example bid documents prepared by the city engineer or contracts proposed by persons or companies who are doing business with the local government. Common examples include professional service agreements with architects and engineers or insurance agreements. When it is in the client’s best interest the attorney might draft changes to these agreements to protect the local government.

An attorney should be involved in negotiating and drafting contracts for unique or out of the ordinary transactions. Examples might include an employment contract, a collective bargaining agreement with a public employee’s union, an agreement for a public franchise, or a memorandum of agreement between a city and tribal government to share administrative responsibilities for providing public services.

Who should communicate with the municipal attorney

All communication with the attorney should be directed through the chief administrator. A lawyer’s time is expensive. The mayor or manager is responsible for monitoring the budget and keeping informed of all issues that may affect the city. For these reasons it is inappropriate for other city officials and employees to be contacting the attorney without the knowledge and permission of the chief administrator. The client of the municipal attorney is the municipality, not an individual department or a member of the city council. The City acts through its chief administrator and it is to the chief administrator that the municipal attorney must answer. This is the relationship contemplated by Alaska law at AS. 29.30.360.

What to do if the municipality is having problems with its attorney.

In the event the municipality should have some difficulty with its attorney or dispute over bills or services the Alaska Bar Association may be able to provide assistance. All attorneys practicing law in the state must belong to the Alaska Bar Association. The Association provides client counseling services and disciplines attorneys who have violated the code of ethics for Alaska attorneys. The address for the Alaska Bar Association is P.O. Box 100279, Anchorage, AK 99510-0279. The Association can also be contacted through its web site at www.Alaskabar.org.